(1)

Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

WIM DELVOYE, in the Matter of Sebastian Delvoye, an infant under the age of one,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTION PRESENTED

Must a two-and-one half month old child have a "habitual residence" as that term is used in the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, *re-printed in* 51 Fed. Reg. 10,494 (1986), implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, et seq. (2003), and, as a result, be protected by the Hague Convention, to which the United States is a signatory nation?

LIST OF PARTIES TO THE PROCEEDINGS

All parties to these proceedings appear in the caption of the case that appears on the cover page to this Petition.

RULE 29.6 STATEMENT

Petitioner states that he is an individual and is therefore not subject to Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wim Delvoye respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit dated May 20, 2003 (Appendix ["A"]-1-A-9), the decision as to which review is sought in this Court, is officially reported at 329 F.3d 330.

The opinion of the District Court for the District of New Jersey dated September 27, 2002 (A-11-A-28) is officially reported at 224 F. Supp. 2d 843.

JURISDICTION

The District Court had original jurisdiction of this case pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (1986), and section 11603(a) of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11603(a) (2003), which implements the Hague Convention in the United States.

The Court of Appeals had appellate jurisdiction of this case pursuant to 28 U.S.C. § 1291. The decision of the Court of Appeals was entered on May 20, 2003.

This Court has jurisdiction of this case under 28 U.S.C. §1254(1), and this Petition is timely under Supreme Court Rule 13(1).

STATUTORY PROVISIONS INVOLVED

This case involves Articles 1 through 5 and 8 through 20 of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), *done* Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986), implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, *et seq.* (1995), and Sections 11601 and 11603 of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601, 11603 (1995).

Articles 1 through 5 and 8 through 20 of the Hague Convention and ICARA §§ 11601 and 11603 are set forth in full in the within Appendix.

STATEMENT OF THE CASE

1. The Purpose and Framework of the Hague Convention

The Hague Convention provides for the return of children "wrongfully removed to or retained in" any signatory country to the Convention (a "Contracting State"). Hague Convention, Art. 1. Both the United States and Belgium are Contracting States to the Convention. In the United States, any person seeking the return of a child under the Convention may commence a civil action for an order of return by filing a petition in a federal district court or a state court where the child is located. ICARA § 11603(a), (b). ICARA vests in the court only the authority to determine whether the child's removal was "wrongful" within the meaning of the Convention. ICARA § 11603(e)(1)(A). An ICARA hearing is not a custody hearing; it merely determines which country should hear the underlying custody claim. Hague Convention, Arts. 16, 19.

A child's removal from or retention in a Contracting State is "wrongful" where (a) it is in breach of rights of custody attributed to a person, either jointly or alone, under the law

of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Hague Convention, Art. 3. The Hague Convention applies to any child who was habitually resident in a Contracting State immediately before any breach of custody rights and ceases to apply when the child attains the age of 16 years. Hague Convention, Art. 4.

"[T]he cornerstone of the Convention is the mandated return of the child to his or her circumstances prior to the abduction if one parent's removal of the child from or retention in a Contracting State has violated the custody rights of the other, and is, therefore, 'wrongful.'" *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995) (citing the Hague Convention, Art. 12). Where a petitioner establishes that the child's removal was wrongful, the court "shall order the return of the child forthwith" to the child's habitual residence, unless the respondent establishes one of more of four limited exceptions.[1] Hague Convention, Arts. 12, 13, 20. Indeed, courts "retain the discretion to order return even if one of the exceptions is proven." *Feder*, 63 F.3d at 226 (citing Pub. Notice 957, 51 Fed. Reg. 10494, 10509 (1986)).

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[1] These exceptions, which are not at issue on this Petition, are: (1) the ICARA proceeding was not commenced within one year of the child's removal; (2) the petitioner was not actually exercising custody rights at the time of removal; (3) there is a grave risk that return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation;" or (4) return "would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms." Hague Convention, Arts. 12, 13, 20.

2. The Factual Background of the Underlying Case

Petitioner Wim Delvoye ("Mr. Delvoye"), a well-known contemporary artist, is a citizen of Belgium who resides and works in a loft in the city of Ghent, Belgium. He also maintains a small studio apartment in New York City that he uses for business purposes approximately three times a year for a week each time. In January or February 2000, Mr. Delvoye and respondent Christina Lee ("Ms. Lee"), a United States Citizen, first met in Venice, Italy and again in Ghent, Belgium. Mr. Delvoye and Ms. Lee thereafter began a romantic relationship that developed "on the Internet, . . . on the phone, [and] was like one of these contemporary relationships." Mr. Delvoye visited Ms. Lee in New York for two or three days in March and April 2000; Ms. Lee visited Mr. Delvoye in Ghent for two weeks thereafter.

At the end of September 2000, Mr. Delvoye, while in Belgium, learned through a phone call from Ms. Lee that she was pregnant with their Child, whom they had conceived in August 2000 while visiting Paris, France. Mr. Delvoye and Ms. Lee discussed the pregnancy by fax, by phone and in person when Mr. Delvoye visited Ms. Lee in New York City in October 2000. They decided to have the Child, and Ms. Lee left for Belgium and began living there with Mr. Delvoye in November 2000.

Sebastian was born in Belgium on May 14, 2001. The testimony is in conflict as to the reasons for and the permanence of the couple's relocation to Belgium and their future plans together. However, it is undisputed that from the date of the Child's birth until July 23, 2001, Mr. Delvoye and Ms. Lee lived together with Sebastian in Ghent, Belgium, and rights of custody were jointly attributed to and exercised by Mr. Delvoye and Ms. Lee under Belgian law.

On July 23, 2001, Ms. Lee removed Sebastian from Belgium with Mr. Delvoye's permission under the guise of her desire to pay a two-week visit to the Child's maternal grandmother in Fort Lee, New Jersey. Ms. Lee bought two round-trip tickets with a return flight two weeks later on August 7, 2001. Mr. Delvoye signed a consent for a United States' passport for Sebastian (which he would have had to do regardless of whether the Child was leaving with his mother for a two-week vacation or forever). It is undisputed that, during a telephone call on August 7, 2001, Ms. Lee first told Mr. Delvoye that she would not be returning to Belgium with Sebastian. Mr. Delvoye never consented, and never would have consented, to Sebastian's permanent or prolonged removal from Belgium.[2]

3. The Proceedings in the District Court

On February 22, 2002, after several unsuccessful attempts to have Ms. Lee return to Belgium with the Child, Mr. Delvoye filed a Petition in the United States District Court for the District of New Jersey pursuant to the Hague Convention and ICARA § 11603(a), (b) for an order compelling Ms. Lee to return Sebastian to Belgium where he was born and had exclusively resided prior to his removal by Ms. Lee so that the courts of Belgium could determine custody and support issues.

The District Court held a hearing on the Petition on June 26 and 27, 2002, and issued its decision and order on September 24, 2002. (A-11-A-27.) The District Court denied the Petition on the ground that Belgium was not Sebastian's habitual residence. The District Court focused its inquiry on the parents' conflicting testimony regarding their *future* intentions for themselves and Sebastian and relied on Ms. Lee's testimony that she did not intend her stay in Belgium to be permanent.

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[2] Each of the foregoing facts is demonstrated in the Record on Appeal to the Court of Appeals for the Third Circuit.

The District Court's decision ignores two fundamental principles underlying the Hague Convention. These are (1) that, to determine habitual residence, the court must "look[ ] back in time, not forward," from the child's removal and "find[ ] any future intentions . . . harbored for [the child] irrelevant to its inquiry." *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995) (internal quotations omitted) (*quoting*, with approval, *Friedrich v. Friedrich ("Friedrich I")*, 983 F.2d 1396, 1401-02 (6th Cir. 1993); and (2) "whatever the parents' intent, habitual residence cannot be acquired without physical presence." *Mozes v. Mozes*, 239 F.3d 1067, 1080 (9th Cir. 2001).

The District Court, in effect, fashioned a new rule of law and implicitly held that a "two month old neonate" such as Sebastian cannot have a habitual residence under the Hague Convention where "the parents shared intentions" regarding where they will live at some future point in time are not settled because a neonate "has not been present [in the place it was before the removal] long enough to have an acclimatization[3] apart from its parents."

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[3] The District Court's reliance on the principle of acclimatization was improper. Acclimatization is the attachment that a mature child may develop in a new country after an alleged wrongful removal. Article 13 of the Hague Convention excuses the duty to return a child to the child's country of habitual residence if a respondent proves, by a preponderance of the evidence, that a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views" has become so acclimatized to its new environment that the child objects to repatriation and, in its discretion, the court chooses to honor the child's wishes. *See, e.g., Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001); *England v. England*, 234 F.3d 268, 272 (5th Cir. 2000). Obviously, acclimatization has no bearing on cases involving children of tender years such as Sebastian and is not relevant to the issue of habitual residence in this case.

4. The Appeal

Mr. Delvoye promptly appealed the District Court judgment to the United States Court of Appeals for the Third Circuit. On May 20, 2003, the Third Circuit affirmed the District Court's holding that Belgium was not Sebastian's habitual residence. The Third Circuit framed the "unique question" attendant to this case as "whether and when a very young infant acquires an habitual residence?" (A-5.) The Third Circuit then proceeded to answer the question:

> Where the parents' relationship has broken down, however, as in this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.

(A-6-A-7.) The Third Circuit held that an infant such as Sebastian (who was two-and-a-half months old at the time of his removal from Belgium) whose parents' intentions as to where they will reside in the future are in conflict does not have a habitual residence and is therefore not afforded the protections of the Hague Convention. Instead, the new rule that flows from the Third Circuit's decision is that whoever grabs the child first gets away with it and gets to have his or her country determine custody and support issues, regardless of where the child was born or resided — in this case, had only ever resided — prior to the removal and regardless of the custody rights of the non-abducting parent in the place the child had resided prior to the removal. Such a result flies in the face of the very purpose of the Hague Convention.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CREATES AN UNPRECEDENTED EXCEPTION TO THE HAGUE CONVENTION WHICH IS IN CONFLICT WITH THE HAGUE CONVENTION ITSELF AS WELL AS OTHER COURTS OF APPEALS' DECISIONS

This Court has never entertained a Hague Convention case. It should do so here. The Third Circuit's ruling is in conflict with the Hague Convention because it arbitrarily excepts certain children from the protections of the Convention. The Third Circuit's ruling also is in conflict with decisions of the Courts of Appeals for both the Sixth and the Eighth Circuits, as well as with a prior Third Circuit decision. For these reasons, the petition for a writ of certiorari should be granted.

1. The Third Circuit's Decision Is in Conflict with The Hague Convention Itself Because There Is No Neonate Exception to Habitual Residence under the Hague Convention

The Third Circuit created a "neonate exception" to habitual residence under the Hague Convention where none was meant to exist. The Hague Convention is explicit as to who is protected under its auspices. Article 4 of the Hague Convention provides:

> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Hague Convention, Art. 4.

The Hague Convention therefore applies to every child under the age of 16 years so long as that child's habitual residence was *in a Contracting State.* The Hague Convention presumes that every child under the age of 16 years has a

habitual residence. The Hague Convention excludes from its protection only those children who have attained the age of 16 years or whose habitual residence was not in a Contracting State. Thus, the Third Circuit's premise, by its very nature, is flawed and fails because there is no neonate exception to habitual residence under the Convention. *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (mother's removal of seven-week-old baby from Mexico where he was born and had resided until removal was wrongful under the Convention).

Any other interpretation of the Hague Convention makes no sense because it leaves some children without the protections afforded by the Hague Convention and, indeed, rewards an abducting parent.

2. The Third Circuit's Analysis of This Case as a So-Called "Settled Intent" Case Is Misplaced Because Sebastian Resided Only in Belgium prior to His Removal

The Third Circuit analyzed this case as if it were a so-called "settled intent" case. "Settled intent" cases are cases in which a court deciding a child's habitual residence has to choose between two or more different countries in which the child had lived *prior* to the alleged wrongful removal or retention. In those cases, the court analyzes the "settled intent" of the parents in determining which of the two or more countries in which the child had resided *prior to* the removal was the child's habitual residence at the time of the removal. A settled intent analysis consists of an analysis of a child's circumstances in each place the child had lived prior to the alleged wrongful removal or retention and the parents' present, shared intentions regarding their child's presence there to determine which place is the child's habitual residence. *See, e.g., Mozes v. Mozes,* 239 F.3d 1067 (9th Cir. 2001), *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995). All of the settled intent cases have concluded that the child at issue in

the case had a habitual residence. Despite many cases where the parents lacked a settled intent to as to where they intended permanently to reside, not one single settled intent case holds that none of the places that a child had lived with its parents prior to the alleged wrongful removal or retention was the child's habitual residence. *See, e.g., Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001) (where the parents disagreed as to the permanence of their relocation to Greece from the United States and one of the children was two months old when it arrived in Greece).

This case, however, is not a settled intent case because no such choice can be made here — Sebastian was born in Belgium and resided exclusively in Belgium with Mr. Delvoye and Ms. Lee until Ms. Lee removed Sebastian from Belgium on July 23, 2001 and took him to the United States. It was thus incorrect for the Third Circuit to analyze this case as if it were a "settled intent" case because Sebastian had only lived in one country — Belgium — prior to his removal by Ms. Lee. "[W]hatever the parents' intent, habitual residence cannot be acquired without physical presence." *Mozes v. Mozes*, 239 F.3d 1067, 1082 (9th Cir. 2001). Sebastian's habitual residence can only be Belgium.

Furthermore, the Third Circuit relied on the District Court's finding that Ms. Lee intended to live in Belgium only temporarily. (A-8.) Even if true, this finding is irrelevant because it is a reflection of future intentions. Moreover, as the Ninth Circuit has held, "[w]hen a child has no clearly established habitual residence elsewhere, it may become habitually resident even in a place where it was intended to live only for a limited time." *Mozes v. Mozes*, 239 F.3d at 1082 (footnote omitted). Even if Ms. Lee indeed had no intent to remain in Belgium forever, Sebastian had no habitual residence elsewhere because he never resided anywhere but Belgium. Thus, Belgium must be Sebastian's habitual residence.

3. The Proper Inquiry Must Focus on the Child's Customary Residence *Prior* to the Removal

The Third Circuit's reliance on Ms. Lee's future intentions as to where she might eventually live squarely conflicts with the inquiry that has been espoused by other Courts of Appeals, as well as a prior decision of the Third Circuit, that one must look back in time to before the removal and not forward. Indeed, the Convention itself provides that "removal or retention of a child is . . . wrongful where it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident *immediately before* the removal or retention." Hague Convention, Art. 3 (emphasis added). Although the Convention does not define the term "habitual residence," the term has been found to mean the child's "customary residence *prior to* the removal." *Friedrich I*, 983 F.2d 1396, 1401 (6th Cir. 1993) (emphasis added).

In *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995), the Third Circuit looked to the Sixth Circuit's decision in *Friedrich I* and stated with approval:

> [e]mphasizing her caretaking role and intentions to return eventually to the United States with Thomas, Mrs. Friedrich argued that Thomas' habitual residence had shifted from Germany to the United States. The court, however, held that Germany was Thomas' habitual residence. Focusing on the child, "look[ing] back in time, not forward[,]" and finding any future intentions that Mrs. Friedrich had harbored for Thomas to reside in the United States irrelevant to its inquiry, the court concluded that Thomas' habitual residence could be "'altered' only by a change in geography [which must occur *before* the questionable removal] and the passage of time, not by changes in parental affection and responsibility." *Id.* at 1401-02.

Feder, 63 F.3d at 222 (emphasis in original; footnote omitted).

As the Sixth Circuit stated in *Friedrich I*:

> This is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore, we hold that Thomas was a habitual resident of Germany at the time of his removal.

Friedrich I, 983 F.2d at 1402. That is precisely what happened here. Sebastian was born in Belgium and resided exclusively in Belgium until his mother removed him to the United States on July 23, 2001. Sebastian was therefore a habitual resident of Belgium. The parents' future intentions are not relevant to the habitual residence analysis of a "one country" case such as this case under the Convention, and taking such future intentions into consideration is in conflict with the prevailing methodology for determining habitual residence.

4. The Third Circuit's Decision Cannot Be Reconciled with *Feder, Nunez-Escudero* and *Friedrich*

The Third Circuit relied on *Feder*, but *Feder* is, after all, a "settled intent" case where the Third Circuit determined that a child who had lived in both the United States and Australia prior to removal was a habitual resident of Australia. The Third Circuit incorrectly relied on *Feder's* "settled intent" language (when Sebastian lived in only one country prior to removal), but conversely ignored *Feder's* guidance for "one country" children — where a child is born and lives exclusively in one country prior to removal, that child's habitual residence is that country. *See Feder*, 63 F.3d at 222. *Accord Friedrich I,* 983 F.2d at 1402. The Third Circuit did not even attempt to reconcile *Friedrich I* with its Opinion.

The relevant facts here are virtually identical to those in *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), where the Eighth Circuit reversed the district court's denial of return and remanded for further proceedings. In *Nunez-Escudero*, the petitioner-father was a citizen of Mexico, while

the respondent-mother was a United States citizen. They married in Mexico in 1992 and had a child in Mexico on July 28, 1993. The respondent mother left Mexico with their seven-week-old infant son and returned to her parents' home in the United States on September 21, 1993. The father petitioned for return. The district court denied return on the ground that the impact of separating the then six-month-old infant from his mother posed a grave risk of harm to the child. The Eighth Circuit reversed, observing that the district court "incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk" of harm. *Id.* at 377.

Moreover, in *Nunez-Escudero*, the district court had not addressed the habitual residence issue, and the respondent-mother argued on appeal that the district court's judgment also could be affirmed on the ground that the child was not a habitual resident of Mexico. Respondent-mother "argue[d] that her son's birth and short stay in Mexico [did] not establish habitual residence there, and compare[d] her baby's situation to that of a baby born to a woman while vacationing in Mexico." *Id.* at 378. The Eighth Circuit refused to affirm the district court's ruling on the alternative ground of habitual residence, stating:

> In [*Friedrich I*], the mother argued that she did not wrongfully remove her son from Germany to the United States because he did not habitually reside in Germany. Id. at 1401. Despite that the son had lived with his parents in Germany for two years, the mother argued the son was a habitual resident of the United States because: (1) he had United States citizenship; (2) the United States was listed as his permanent address for the purpose of documentation; and (3) *she intended to return to the United States with her son when she was discharged from the army*. Id.

> The Sixth Circuit rejected the mother's argument, explaining "[a] person can only have one habitual residence." Id. The court stated that "[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, *not future intentions*." Id. Because the child was born in Germany and lived there exclusively, the court concluded that the child was a habitual resident of Germany. Id. at 1402. The court explained: "habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility." Id.

Id. at 379 (emphasis added).

Furthermore, the Third Circuit's attempt to distinguish this case from *Nunez-Escudero* because "the petitioner and respondent had married in Mexico and lived there together for nearly a year before the child was born [and] a basis existed for finding the child's habitual residence to be in Mexico" is unavailing. That is not the basis for the Eighth Circuit's determination.

Looking back in time, as the Court is required to do, Sebastian was born in Belgium and resided exclusively in Belgium with his mother and father until his mother removed him from Belgium on July 23, 2001. According to *Feder, Friedrich* and *Nunez-Escudero,* Sebastian's habitual residence immediately prior to his removal can only be Belgium.

CONCLUSION

This Court should grant petitioner Wim Delvoye's Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

Dated: August 15, 2003

Respectfully submitted,

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PRECEDENTIAL

Filed May 20, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3943

WIM DELVOYE, in the Matter of
Sebastian Delvoye, an infant under the age of one,
Appellant,

v.

CHRISTINA LEE

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civ. No. 02-cv-00769)
District Court Judge: Faith S. Hochberg

Argued: February 13, 2003

Before: ALITO and McKEE, Circuit Judges, and
SCHWARZER,* Senior District Judge
(Filed: May 20, 2003)

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* Honorable William W Schwarzer, Senior United States District for the Northern District of California, sitting by designation.

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OPINION OF THE COURT

SCHWARZER, *Senior District Judge.*

This is an appeal from an order of the district court denying Wim Delvoye's petition to return Baby S to Belgium under the *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980; T.I.A.S. No.

11670, 19 I.L.M. 1501 (the "Convention").[1] The district court found and concluded that petitioner had failed to meet his burden of proving that Baby S was an habitual resident of Belgium and thus was wrongfully removed from that country. We affirm.

[1] The Convention is implemented at 42 U.S.C. § 11603 (2003).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner and respondent met in New York early in 2000. Petitioner resided in Belgium but made several trips to visit respondent. On his visits to New York, a romantic relationship developed between them. In August 2000, respondent moved into petitioner's New York apartment. While continuing to live in Belgium, petitioner spent about a quarter of his time in New York. In September 2000, respondent learned that she was pregnant with petitioner's child. Respondent began prenatal care in New York, but because petitioner refused to pay the cost of delivery of the baby in the United States and Belgium offered free medical services, respondent agreed to have the baby in Belgium. In November 2000, she traveled to Belgium on a three-month tourist visa, bringing along only one or two suitcases. She left the rest of her belongings, including her non-maternity clothes, in the New York apartment. While in Belgium respondent lived out of her suitcases. When her visa expired she did not extend it. The baby was born on May 14, 2001. By then the relationship between the parties had deteriorated. After initially resisting, petitioner signed the consent form that enabled respondent to get an American passport for Baby S and agreed to respondent's return to the United States with Baby S in July 2001. Over the next two months, petitioner made several trips to the United States and the parties made several attempts to reconcile. When those efforts failed, petitioner filed this petition. Following an evidentiary hearing, the district court denied the petition. This appeal followed. Because the order is a final disposition of the petition, we have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

Article 3 of the Convention provides in relevant part:

> The removal . . . of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed

> to a person . . . either jointly or alone, under the law of the State in which the child was *habitually resident* immediately before the removal. . . .

(Emphasis added.)

The determination of a person's habitual residence is a mixed question of fact and law. We review the district court's findings of historical and narrative facts for clear error, but exercise plenary review over the court's application of legal precepts to the facts. *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995); *see also Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001).

The issue before us is whether Baby S was "habitually resident" in Belgium at the time of his removal to the United States. In *Feder*, we defined the relevant concept:

> [A] child's habitual residence is the place where he . . . has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

63 F.3d at 224. The district court held that petitioner had failed to meet his burden of proving that Baby S was an habitual resident of Belgium. It reasoned that a two-month-old infant, who is still nursing, has not been present long enough to have an acclimatization apart from his parents.

This case then presents the unique question of whether and when a very young infant acquires an habitual residence. It differs from the run of decisions under the Convention where the child is assumed to have an habitual residence initially and the controversy is over a change of that residence. No

decisions have squarely addressed the issue before us. The leading treatise on the Convention provides some general guidance:

> There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for habitual residence of dependence. However, in practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian. Where a child is very young it would, under ordinary circumstances, be very difficult for him . . . to have the capability or intention to acquire a separate habitual residence.

Paul Beaumont & Peter McEleavy, *The Hague Convention on International Child Abduction* 91(1999). An English court has said: "The habitual residence of the child is where it last had a settled home which was in essence where the matrimonial home was." *Dickson v. Dickson*, 1990 SCLR 692. And an Australian court has stated: "A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it." *Re F* (1991) 1 F.L.R. 548, 551.[2]

Where a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem, it simply calls for application of the analysis under the Convention with which courts have become familiar. Where the parents' relationship has broken down, however, as in

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[2] These cases assume that the parents had joint custody. This is true under Belgian law regardless of whether the parents are married. *See* H. Bocken and W. DeBondt, *Introduction to Belgian Law* 150 (cohabiting parents) (2001). But the situation is different where only one parent has custody rights. Thus, "where a child of [two years of age] [was] in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers." *In re J (C v. S)* [1990] 2 AC 562, 579.

this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.

That is not to say that the infant's habitual residence automatically becomes that of his mother. In *Nunez-Escudero v. Tice-Menley,* 58 F.3d 374 (8th Cir. 1995), Nunez-Escudero and Tice-Menley married in Mexico in August 1992. A child was born there in July 1993. In September, Tice-Menley left Mexico with her two-month-old infant and returned to the United States. Nunez-Escudero filed a petition under the Convention alleging that his son had been wrongfully removed. The district court denied the petition on the ground that return of the child would subject him to a grave risk of harm. The court of appeals reversed and remanded. The mother contended that the court should affirm, notwithstanding the erroneous grave risk of harm determination, on the ground that the infant was not an habitual resident of Mexico. The court rejected the argument and remanded for a determination of the child's habitual residence, stating,

> To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is where the mother happens to be.

58 F.3d at 379.

The instant case differs from *Nunez-Escudero*. Because the petitioner and respondent had married in Mexico and lived there together for nearly a year before the child was born, a basis existed for finding the child's habitual residence to be in Mexico. Here, in contrast, the district court found that

respondent, at petitioner's urging, had traveled to Belgium to avoid the cost of the birth of the child and intended to live there only temporarily. She retained her ties to New York, not having taken her non-maternity clothes, holding only a three-month visa and living out of the two suitcases she brought with her. Thus, there is lacking the requisite "degree of common purpose" to habitually reside in Belgium. As explained in *Re Bates*,

> There must be a degree of settled purpose . . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989), quoted in *Feder*, 63 F.3d 223.

Because petitioner and respondent lacked the "shared intentions regarding their child's presence [in Belgium]," *Feder*, 63 F.3d at 224, Baby S did not become an habitual resident there. Even if petitioner intended that he become an habitual resident, respondent evidenced no such intention. Addressing the status of a newborn child, one Scottish commentator said:

> [A] newborn child born in the country where his . . . parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.

Dr. E. M. Clive, "The Concept of Habitual Residence," *The Juridical Review part 3*, 138, 146 (1997).

Based on the district court's factual findings, which have not been challenged, we conclude that petitioner failed to prove that Baby S was habitually resident in Belgium.

We affirm the district court's order.

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FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

Civil Case No. 02-769 (FSH)

OPINION

Date: September 24, 2002

HOCHBERG, *District Judge*

This matter comes before the Court by Wim Delvoye's petition for the return of his son (referred to as "Baby S") to Belgium under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501. Petitioner contends that Baby S was wrongfully removed from Belgium by Christina Lee (Respondent), Petitioner's former girlfriend and the mother of Baby S, and that under the Convention Baby S should be returned to Belgium so that the Belgian courts may adjudicate a custody hearing.

FACTS

Petitioner and Respondent first met during February or March 2000 when Petitioner was an artist and Respondent was working for an art gallery. Petitioner and Respondent

began a romantic relationship shortly thereafter. Petitioner testified that during the months of March and April 2000, he traveled to New York from Belgium approximately five times, solely to see Respondent. During those visits, Petitioner and Respondent stayed in Petitioner's Manhattan apartment. As the relationship progressed, Petitioner and Respondent met a few more times, again staying in Petitioner's apartment in Manhattan, and, on one occasion, meeting in Belgium.

In August 2000, Respondent moved into Petitioner's Manhattan apartment.[1] Petitioner lived mostly in Belgium at the time, but spent about a quarter of his time in New York. When Respondent moved into the apartment, she brought with her a number of items, including a night table, a kitchen table and chairs, books, a television, clothes, a microwave, shoes, jewelry, kitchenware, and other items.

Respondent learned in late September 2000 that she was pregnant. After a number of discussions regarding the possibility of an abortion – which Petitioner vehemently opposed – the couple decided to carry the baby to term and Respondent began prenatal care in New York City. Petitioner, on at least one occasion, joined Respondent on a visit to her obstetrician in New York.

The original plan was to have the baby in the United States. On or about October 2000, the parties discussed the cost of having a baby in the United States. Petitioner testified that he was told that the cost would be about $20,000 and that he thought this was "really funny" (in the surprising sense). Petitioner testified that a person could "even get money [for giving birth] in Belgium." Both parties testified that Petitioner refused to pay for any of Respondent's

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[1] Petitioner testified that Respondent was renting the Manhattan apartment from him. Under cross-examination, however, he stated that she never paid him any rent.

medical costs if the baby were carried to term in the United States. Rebecca Sutherland, a graduate student at Harvard University who is a close personal friend of Respondent, was telephoned by Petitioner several times in his effort to get Sutherland to persuade Respondent to travel to Belgium temporarily so as to take advantage of that country's free medical services.

The parties' testimony differs on the purpose of their travel to Belgium. Petitioner testified that he asked Respondent to join him in Belgium since he was settled there, had a large apartment there, and based his artistic career there.[2] Respondent testified that Petitioner adamantly insisted that she join him in Belgium for the term of the pregnancy, threatening not to pay for any medical care if she did not do so. She testified that her decision to travel to Ghent, Belgium was made under duress, as she was afraid about financing the pregnancy and wanted very much to get married. Respondent at all times believed that her travel to Belgium was temporary and she planned to return to the United States as soon after the birth of her baby as she could safely travel. After returning to the United States, Respondent testified, the couple would always keep a Manhattan apartment and would also consider a metropolitan European city as a future second residence. Respondent's testimony was corroborated by Ms. Sutherland, whose testimony was based substantially on direct conversations with Mr. Delvoye. Before the birth, Mr. Delvoye told Ms. Sutherland that Ms. Lee and her baby would spend at least half the year in New York, with the remainder in Europe – either in Belgium, Paris or London.

In November 2000, when Respondent was four months pregnant, she traveled to Belgium on a three-month tourist visa. She brought along only one or two suitcases filled with

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[2] Petitioner is a recognized contemporary artist in Belgium, whose productive efforts are shown in New York, Belgium and elsewhere.

maternity clothing. Respondent did not remove her belongings from the Manhattan apartment; rather, she left her non-maternity clothes, books, jewelry, shoes, microwave, dishes and furniture in New York.

Petitioner's apartment in Ghent, Belgium consisted of a large loft space where he lived and worked. Sutherland testified that Petitioner's loft could be reached only by scaling several steep flights of stairs, the last flight of which had no railing. (Late in the pregnancy, a railing was installed.) Petitioner and Respondent slept on a mattress on the floor in one part of the loft, which had no closets or dividing walls. The only private room was a bathroom. In the middle of the loft was a long table that Petitioner used for his art work.

Sutherland testified that when she visited Ghent in March 2001, Respondent was still living out of a single suitcase, which was not unpacked. Indeed, during Respondent's entire stay in Belgium, she lived out of her suitcase. Neither Petitioner nor Respondent took any steps to extend Respondent's three-month tourist visa or to obtain any permanent visa. Despite having great difficulties communicating in a region where people spoke mostly Flemish, Respondent never attempted to learn Flemish. Baby S was born in Belgium on May 14, 2001. The parties' relationship was deteriorating both before and after the birth of their child.[3] Respondent testified that she sought

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[3] Respondent blames the deteriorating relationship on Petitioner's uncontrollable rage and his increasingly bizarre forms of art, which consisted of replicating human excrement and/or animal or human copulation depicted in x-rays. At the hearing, much of Petitioner's art was introduced into evidence by Respondent in an attempt to lay the foundation for a claim that the return of Baby S to Belgium would pose a grave risk of psychological harm for Baby S. To this end, Respondent introduced pictures of Petitioner's art, including pictures of: an x-ray of Petitioner licking a pig's anus; an x-ray of pigs arranged so as to depict them having sex; x-rays of women performing fellatio; an x-ray of male

to return to the United States earlier than July 23, 2001, but she could not get a United States passport for the baby without Petitioner's consent, which he initially declined to give. During arguments, Petitioner threatened to have Respondent deported without her baby. After continued fighting, Respondent testified, Petitioner finally consented to Respondent's departure with Baby S – instructing her to "[l]eave with the baby now before I get attached."

Petitioner thereupon signed a two-parent consent form needed to obtain a United States passport for Baby S. Petitioner drove Respondent and Baby S to the airport and

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genitalia beside a woman's breasts; pigs tattooed by Petitioner; and stained glass windows with x-rays ranging from pigs to an x-ray of Petitioner's nephew surrounded by pigs. Pictures were also shown of Petitioner's Cloaca machine, a large machine that is fed regular human food and, twenty four hours later, excretes the biological equivalent of human feces. Evidence was also introduced that Petitioner used pictures taken from sonograms of the baby in his art.

Respondent also alleges that Petitioner's interest in contemporary art led Petitioner to examine human excrement in odd ways. According to Respondent, Petitioner was very excited while changing diapers because of his fascination with human excrement. In addition, Respondent alleges that Petitioner, when his sister's infant daughter was being changed, expressed interest in examining the infant's private parts.

Respondent testified that Petitioner also used her in his art work, bringing her to a radiologist two weeks after giving birth to be x-rayed with her vagina filled with barium into which a sexual object had been inserted. When Respondent objected, Petitioner threatened to do the x-ray with another female friend.

Respondent sought to introduce into evidence a psychological report of Petitioner prepared by an expert hired by Respondent. However, the expert was unable to attend the hearing. The proceeding was therefore bifurcated and consideration of the expert's report and expert testimony as to risk of psychological harm were stayed pending resolution of the issues that would not require expert testimony. Only if those issues were not dispositive would the Court then reach the issue of grave risk of psychological harm.

they returned to the United States.[4] Although Petitioner testified that he only agreed that Respondent could return to the United States with Baby S for a short visit, his behavior at the airport suggests otherwise[5] Respondent and Baby S moved in with Respondent's mother in Fort Lee, New Jersey.

Petitioner returned to the United States on a number of occasions between July 2001 and January 2002. While the parties disagree on the nature of the trips – whether for business or to visit Respondent and Baby S – it is undisputed that on these trips the parties tried in vain to reconcile. While attempting to reconcile, Petitioner offered to return to the United States and to make a home there.[6] He and Respondent investigated housing options in New York, as his Manhattan apartment was too small for a family. In a letter to Respondent's mother, Petitioner also offered to pay for the child's education in America.

At the hearing, Petitioner acknowledged having repeatedly lied to Respondent in a tactical ploy to win back Respondent's affections. In one letter to Respondent, Petitioner wrote that he had seen a psychiatrist and that he had spent some time in a hospital, implying that he had been treated for his psychological problems and that his psychological condition was much improved. At the hearing,

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[4] The airline tickets purchased by Respondent were round-trip tickets. Respondent testified that she purchased round-trip tickets because they were discounted fares that were cheaper than one-way fares. Respondent testified that she never intended to use the return ticket. She never did. Respondent's testimony was not refuted on this issue with any evidence to the contrary, nor with any impeachment of Respondent's testimony.

[5] Petitioner was extremely emotional, videotaping Respondent and Baby S throughout the airport to keep a memory of the baby. He also requested a piece of the baby's clothing to keep as a remembrance.

[6] In a letter from Petitioner to Respondent dated August 14, 2001, Petitioner stated: "I am willing to come and settle with you in New York – if you want that."

however, Petitioner testified that he never saw a psychiatrist and was never in a hospital. Indeed, Petitioner had simply fabricated the statements. Petitioner also testified that he had previously lied to the Belgian authorities by obtaining a letter falsely claiming that he had a mental problem that prevented him from serving in the military.

When the parties were unable to resolve their differences amicably, Petitioner filed a petition seeking the return of Baby S to Belgium under the Convention.

STANDARD OF REVIEW

The Convention is an international treaty created in an attempt to "protect children . . . from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. . . ." Convention, Preamble. In 1988, Congress passed the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601 *et seq.* (1988), to establish procedures to implement the Convention in the United States. The established procedures are "aimed at maintaining the status quo and deterring parents from crossing international boundaries in search of a more sympathetic court." *Wanninger v. Wanninger*, 850F. Supp. 78, 80 (D. Mass. 1994) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)).

Under the Convention, a district court is authorized to adjudicate the merits of a wrongful removal or detention claim, but not the underlying custody dispute. *Friedrich*, 983 F.2d at 1400. The inquiry is therefore limited to whether removal or retention of the child in question was "wrongful" under the Convention. Convention, Arts. 3, 12; *see also Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995). Petitioner has the burden of proving, by the preponderance of evidence, wrongful removal or retention. 42 U.S.C. § 11603(e)(1)(A). Under Article 3 of the Convention,

removal or retention of a child is "wrongful" where: "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Convention, Art. 3. Removal or retention under the convention is only wrongful if the child is removed from his or her "habitual residence." *See Friedrich*, 983 F.2d at 1400. The remedy for wrongful removal or retention is the return of the child. Convention, Art: 12; *Feder*, 63 F.3d at 221.

The general rule of return has four exceptions:

> (1) grave risk that return of the child would expose [him] to physical or psychological harm; (2) violation of fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms; (3) delay more than one year after the child [has] become settled in a new environment; or (4) consent by the petitioner to the removal or retention.

Wanninger, 850 F. Supp. at 81. Once Petitioner meets his burden of proving wrongful removal or retention, Respondent has the burden of proving an exception. The first two exceptions must be proved by clear and convincing evidence, while the latter two need only be proved by a preponderance of the evidence. 42 U.S.C. §§ 11603(e)(2)(A) and (B).

DISCUSSION

Respondent has presented three alternate grounds for denying the petition to return Baby S to Belgium. First, Respondent argues that Petitioner has not proven wrongful removal or retention of Baby S because he has failed to meet his burden of proving by a preponderance of the evidence

that Belgium is the habitual residence of Baby S. In the alternative, Respondent argues that Petitioner consented to the baby's removal from Belgium to the United States, thereby putting this matter under the fourth exception to the return of a child to his or her habitual residence. Finally, Respondent argues that return of the infant to Belgium would pose a grave risk of psychological harm to him.

Habitual Residence

The term "habitual residence" is not defined in the Convention or ICARA. Courts have conducted fact-based analyses that evaluate whether a child's presence in a country is of sufficient duration to have a "degree of settled purpose" from the child's perspective, as well as the parents' shared intentions regarding their child's presence in a country. *Feder*, 63 F.2d at 224. In *Feder*, the Third Circuit explained that:

> [A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id. at 224. In *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), the court found that "settled intent" regarding habitual residence requires more than a mere intent to change residence. *Id.* At 1075. Rather, there must be some intent to abandon the prior habitual residence. *Id.*

In this Circuit it is clear that the parents' shared intentions regarding the child's presence in a country are considered along with an analysis of the child's circumstances there. Feder, 63 F.3d at 224. In the case of a newborn infant who is still nursing, it is particularly appropriate to focus on parental

intentions in determining a child's habitual residence. *Cf. In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993). A two-month old neonate simply has not been present anywhere long enough to have an acclimatization apart from his parents.

In the present case, the witnesses offer conflicting testimony about their intentions regarding Baby S's habitual residence. Petitioner testified that the couple had decided to move to Belgium indefinitely after they decided that Respondent would carry the baby to term. Respondent testified that they decided to live only temporarily in Belgium for the later months of her pregnancy, and that this decision was made only after Petitioner complained about the high cost of carrying a child to term in the United States and refused to pay any of the medical costs of pregnancy and delivery in the United States. According to Respondent, the temporary move was meant to end shortly after the baby's birth.

Respondent's account of the events is supported by the testimony of Ms. Sutherland, who testified to conversations with both Petitioner and Respondent indicating that the move to Belgium was intended to be temporary. Petitioner himself testified that he wanted Respondent to go to Belgium to avoid the high cost of carrying a child to term in the United States. He also told Ms. Sutherland that Respondent and the baby would thereafter live in the United States for at least six months each year.

In the face of conflicting testimony, this Court must make credibility determinations based on its perception of the parties as witnesses and on the evidence offered to support or refute the parties' testimony.[7] In observing the witnesses, the Court notes that Petitioner failed to answer many questions

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[7] The Court makes credibility determinations reluctantly in such a proceeding. *Cf. In re Ponath*, 829 F. Supp. at 366 n.3 making a credibility determination in a child abduction case).

directly. Petitioner's credibility is also damaged by the fact that he has admitted lying to Respondent throughout their relationship. For example, Petitioner told Respondent that he had seen a psychiatrist and that he had been to the hospital "for four days, recovering from grief and cleaning up the bad spirits with a good doctor"– statements that Petitioner admits having made but acknowledges were untrue. Petitioner also acknowledges having obtained a false letter about a "made up" psychiatric condition which was given to the Belgian authorities.

Respondent's testimony, by contrast, was not significantly impeached and was corroborated by Ms. Sutherland. Ms. Sutherland offered the most calm, composed and credible testimony of the three witnesses. Neither side impeached Ms. Sutherland's credibility, and testimony was given that both Petitioner and Respondent trusted Ms. Sutherland and sought her help in their attempts to reconcile. This Court therefore finds the testimony offered by Respondent and Ms. Sutherland relating to the habitual residence more credible than the conflicting testimony of Petitioner.

The Court's decision to credit Respondent's testimony that Belgium was not the habitual residence of the neonate is also supported by the substantial weight of the circumstantial evidence. Petitioner owned his New York apartment and invited Respondent to move in there. When she did so, Respondent brought with her furniture and other items that are consistent with moving to a permanent residence. Upon finding out that she was pregnant, Respondent started her prenatal care in New York with a New York doctor. It is undisputed that the primary motivation to have the baby in Belgium was to obtain free medical care and avoid the high cost of carrying a baby to term in the United States. No evidence was presented to indicate that the parties thought that the departure from New York would be permanent. For example, there was no "going-away" party; no sale of the

New York apartment; no removal of furniture from the New York apartment; and no removal of Respondent's non-maternity clothing from the New York apartment. *See Kanth v. Kanth*, 239 F. Supp. 2d 1317 (D. Utah 1999) (where parties did not sell property in the United States and took no other steps consistent with a permanent move, habitual residence did not change in a move lasting less than one year). The parties applied for only a three-month tourist visa for Respondent and never applied for any visa extension or a permanent visa. Respondent brought nothing more than one or two suitcases filled with maternity clothing to Belgium. While there, Respondent lived out of her suitcases, having never fully unpacked. Respondent did not take classes in Flemish and never sought employment in Belgium. *Cf. Feder*, 63 F.3d at 224 (intent of parents evidenced by purchase of new house and future employment decisions). Petitioner offered no evidence to show that the parties had planned any steps to settle Baby S into life in Belgium.[8] By contrast, Petitioner's correspondence with Respondent's mother, written shortly after Respondent and Baby S returned to the United States, revealed Petitioner's intention to educate the infant in the United States. In short, the parties' intentions and actions do not support the view that Belgium was the habitual residence of Baby S despite his birth and first sixty days of life in that country.[9]

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[8] The Court notes that many parents do not take active planning steps for their infant children. However, in examining the circumstances surrounding the parties' stay in Belgium, the Court looked for circumstantial evidence relating to any factor that supports Petitioner's position. No such evidence was presented.

[9] Once in Belgium, Petitioner may have changed his mind and wanted to make Belgium the family's habitual residence. However, a unilateral decision or change of heart by one party cannot change the settled intent of the parties regarding the habitual residence. *Feder*, 63 F.3d at 225. The settled joint intent of the parties here was to move to Belgium only temporarily.

Petitioner argues that the "settled intent" cases do not apply because they all involve situations in which a court had to choose between two different countries in which the child had lived *prior* to the alleged wrongful removal or retention.[10] Here, he argues, the baby was out of the womb exclusively in Belgium for the two months before respondent took him to New York, and therefore his only possible habitual residence is Belgium. While Petitioner cites a number of cases in which a young child was returned to the country in which he or she was born, there are distinguishing factors that, when taken together, set this case distinctly apart from those cases. Here, Respondent was already pregnant at the time she left the United States and entered Belgium; the parents' intent was for the stay in Belgium to be a temporary money-saving measure; Respondent only remained in Belgium for the latter months of her pregnancy and immediate postpartum period before taking steps to depart; the infant was two months old and nursing at the time he left Belgium with his mother and there were no other older children in question, *cf. Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001) (children were five-years, two-years, and two-months old); and the father drove the mother and baby to the airport after signing a consent to give the baby a U.S. passport. These factors, taken together,

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[10] During the hearing, Petitioner's counsel somewhat retreated from his position. The Court asked the following:

> Court: Well, let me ask you this hypothetically. Are you saying that if [the parties] agreed to go to Belgium to have this baby and [returned to the United States] within a week after being in Belgium, when she was able to travel again and return to the United States, that this baby has to stay in Belgium?
>
> . . .
>
> Petitioner's Counsel: . . . I'm not prepared to press my point to that degree . . . . I have considered your honor's hypothetical and I think that could raise other issues.

set this case apart from the cases relied upon by Petitioner to support his "birth country" theory."[11]

This Court rejects any bright line rule that a child born in a country is automatically a habitual resident of that country, regardless of all other evidence to the contrary. That is not the analysis mandated by this Circuit in *Feder*. Surely, if a couple lives in the United States and gives birth to a child during a summer visit to a vacation home in the Swiss Alps, the habitual residence of the child is not Switzerland. The situation in the present case, while slightly more drawn out, is no different. The parties never jointly intended to make their permanent home in Belgium, and the birth of a baby during a short stay there to save on medical bills does not

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[11] Petitioner relies heavily on *Nunez-Escudero v. Tice-Medley*, 58 F.3d 374, 375 (8th Cir. 1995) to support this theory. In *Nunez-Escudero*, the father and mother resided and wed in Mexico. *Id.* at 375. Approximately eleven months after being wed, the parents had a child, also in Mexico. *Id.* Three months later, the mother took the child to the United States. *Id.* The father appealed, stating that Mexico was the habitual residence. *Id.* The mother argued that she always thought she would return to the United States but was forced to stay in Mexico until she finally left. *Id.* at 378. The mother also argued that an infant cannot have a habitual residence of its own and must therefore follow the mother. The Eighth Circuit rejected the mother's arguments. The court noted that the habitual residence cannot derive solely from the mother's residence, as it would be inconsistent with the Convention: Id. at 379. The court distinguished *In re Ponath*, in which a child was returned to the United States after the family temporarily moved to Germany, by explaining that the child in question in *Nunez-Escudero* was always in Mexico.

The holding in *Nunez-Escudero* is not at odds with this Court's view. In this case, the Court's decision regarding the infant's habitual residence is not derived from a conclusion that because the Respondent wants to be in the United States, so should the baby. Rather, the decision is based on the fact that both Petitioner and Respondent's stated intent to Ms. Sutherland, corroborated by all of the circumstantial evidence, is that Belgium was only a temporary place to give birth. In *Nunez-Escudero*, there was no comparable evidence. In this case, moreover, there is an utter lack of evidence to support Petitioner's burden to prove that Belgium is where the infant resided with "a degree of settled purpose."

change the parties' "degree of settled purpose" regarding their child's habitual residence. There is no credible evidence that the stay in Belgium was ever jointly intended to be anything more than temporary. Rather, the overwhelming weight of the evidence is that both parties' stated intent before the birth was to go to Belgium to bear the baby, followed shortly thereafter by a return to New York as a home base for at least half of the year.

The Court finds that the Petitioner has failed to meet his burden to prove that Belgium is the habitual residence of Baby S. Thus, there has been no wrongful removal or retention of the infant.[12]

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[12] Given this Court's conclusion as to the habitual residence of Baby S, it is unnecessary to address Respondent's argument that Petitioner consented to Respondent's removal of the infant to the United States within the meaning of Article 13a of the Convention. If it were to reach the consent issue, however, this Court would be inclined to find that Petitioner did, in fact, consent to the infant's removal. Based upon the fact that Petitioner signed a two-parent consent form for the infant's U.S. passport within days after instructing Respondent to "[l]eave with the baby now before I get attached," Petitioner's highly emotional request for a memento of the baby prior to his departure, and his extended videotape of the departure scene at the airport, this Court does not find his testimony that he only consented to a two week visit to the United States credible.

It is also unnecessary for the Court to decide at this time whether return of the infant to Belgium would pose a grave risk of psychological harm under Article 13b of the Convention. Because Respondent's expert psychologist was unavailable at the hearing, the Court bifurcated this issue from the other issues in the case. Petitioner's pending *in limine* motion to exclude the expert's report and testimony is therefore dismissed as moot. The Court does note, however, that many serious questions were raised at the hearing regarding Petitioner's psychological condition. If it were necessary to reach the issue of psychological harm, this Court would take the testimony of the psychologist and consider appointing its own expert to examine.Mr. Delvoye.

CONCLUSION

For the foregoing reasons, Wim Delvoye's petition to return Baby S to Belgium is denied based upon insufficient evidence having been adduced to meet his burden of proving that Baby S was a habitual resident of Belgium and thus was wrongfully removed from that country. An appropriate order will issue."[13]

/s/ FAITH S. HOCHBERG
HON. FAITH S. HOCHBERG, U.S.D.J.

[13] Given the Court's disposition of this matter after a full evidentiary hearing, Petitioner's pending motion for summary judgment is dismissed as moot.

COURT PAPERS
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By /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

Civil Case No. 02-769 (FSH)

ORDER

Date: September 24, 2002

HOCHBERG, *District Judge*

This matter having come before the Court by Wim Delvoye's Petition For Return Of Child To Belgium pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, and the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.*; and this

Court having fully considered the submitted briefs and the record before it after a full hearing on the merits; and for the reasons expressed in the opinion issued this same day; and for good cause shown

IT IS on this 24st day of September, 2002,

ORDERED that the petition is **DENIED**;

ORDERED that all other pending motions in the above-captioned matter are **DISMISSED** as moot; and

ORDERED that this case is **CLOSED**.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg
United States District Judge

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attaint the age of 16 years.

Article 5

For the purposes of this Convention –

a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to

the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal of retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Ch. 121 CHILD ABDUCTION REMEDIES

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

* * *

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The Courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of the case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the

return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Supreme Court, U.S.
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No. 03-280

In The
Supreme Court of the United States

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Hague Convention was promulgated and designed with the noble cause to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of their habitual residence. In doing so, the Convention sought to dissuade parents from wrongfully removing children in search of a more sympathetic court.

The Hague Convention is invoked where a child is wrongfully removed or retained from its place of habitual residence. *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994). In analyzing whether the Hague Convention applies, the Court must first determine the threshold question of where is the habitual residence of the child. *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001).

The determination of a child's habitual residence is a factual determination made on a case-by-case basis. *In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted).

There is no wrongful removal to the United States if a) the parent consents to the child's removal, *Shalit v. Coppe*, 182 F.3d 1124 (9th Cir. Alaska 1999), *amended by Shalit v. Coppe*, 99 Cal. Daily Op. Service 7575, 99 D.A.R. 9629 (9th Cir. Sept. 14, 1999); *Gonzalez-Caballero v. Mena*, 251 F.3d 789 (9th Cir. Ariz. 2001) or, b) the Court finds the habitual residence of the child is the United States. *In re Application of Ponath*, 829 F. Supp. 363, 365 (D. Utah 1993) citing *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995).

Ordinarily, a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective. *Feder*, 63 F.3d at 222-24 (citing the High Court of Justice in *In re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989)); *Zuker v. Andrews*, 2 F. Supp. 2d 134 (D. Mass. 1998); *In re Ponath*, 829 F. Supp. at 365.

However, in the case of a young child, the conduct, intentions, and agreements of the parents during the time preceding the alleged abduction are important factors to be considered. There must be a degree of **settled purpose** between the parents. *Kanth v. Kanth*, 2000 U.S. App. LEXIS 27383 *4 (10th Cir. Utah 2000) (emphasis added). *See also In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted) (holding that a two-year-old child is unable to meaningfully and independently express his feelings regarding his habitual residence and has no capacity to determine such status); *Tsarbopoulos*, 176 F. Supp. 2d at 1055 ("For the newborn, Jason, and the two year old Joanna, there was understandably no acclimatization to Greece. At their ages, their world revolved around their mother, their home . . .").

STATEMENT OF FACTS[1]

Christina Lee (hereinafter, referred to interchangeably as the "Respondent" or "Christina") began a romantic relationship with Wim Delvoye (hereinafter, referred to interchangeably as the "Petitioner" or "Wim") during May 2000. From May through October 2000, Petitioner traveled to New York from Belgium to be with Christina, at least one week out of every month. During each visit, Christina stayed with Wim at the Manhattan apartment that he owns.

In August 2000, Christina moved into Wim's Manhattan apartment with all her necessary belongings, including, *inter alia*, clothing, shoes, a kitchen table and chairs, a night table, kitchen utensils, many books that she referred to regularly for her profession, jewelry, dishware, a microwave oven, a rice cooker, a television, etc. Christina considered this to be her home. Christina lived in the Manhattan apartment until her departure for Belgium in mid-November 2000.

On or about the end of September or early October 2000, Christina discovered she was pregnant with her son, Sebastian, and informed Wim. Christina immediately

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[1] Each of the foregoing facts is found in the General Appendix submitted in the Record on Appeal to the Court of Appeals for the Third Circuit. It is respectfully submitted that Petitioner's recitation of the facts, i.e., that Respondent wrongfully removed Sebastian under the "guise" of a two-week visit to the United States is contrary to the factual findings of the District Court, which were further not disputed on appeal to the Third Circuit Court of Appeals. *See* p. A-9 of Petitioner's Brief Appendix.

began prenatal care with a New York obstetrician. Christina and Wim had many discussions about whether or not to proceed with the unplanned pregnancy.

Initially, Christina and Wim agreed that Christina would remain in New York during the pregnancy with Wim traveling back and forth. Then Wim changed his mind, and began insisting that Christina temporarily come to Belgium to give birth to Sebastian because he refused to pay the medical expenses in New York. He claimed that it was more affordable in Belgium because of their socialized medical system and that one ". . . would even get money in Belgium" for having a baby there. He told Christina that if she insisted on giving birth to the baby in New York, Christina's mother would have to pay for it.

The couple discussed marriage, but Wim refused to be married in the United States, citing various reasons while falsely promising to marry Christina before the baby was born if she had the child in Belgium. As a further inducement to having the baby in Belgium, Wim agreed that New York would be a home base for the family, also promising Christina that they would look into setting up a European base in a major international city such as Paris, London, Brussels or Madrid. The couple never discussed remaining in Ghent, Belgium as a European home base. Wim also promised Christina that he would care for her and fully support her during the pregnancy. He promised Christina that they would temporarily rent a separate apartment because he admitted that his one-room loft, which also served as his office, was inappropriate for an expectant mother.

In mid-November 2000, when Christina departed for Ghent, Belgium, she was four months pregnant. Expecting to be returning to the New York apartment, she brought with her only one suitcase filled solely with maternity clothes and a handful of pregnancy and baby care books. She left all of her belongings in Wim's Manhattan apartment. Wim also had left his personal belongings at the Manhattan apartment untouched. All the furnishings, kitchenware, appliances, non-maternity clothing, books, etc. remained where they were, unchanged.

Christina traveled to Belgium on a three-month tourist visa, which eventually expired. Nothing was done to change or correct Christina's immigration status, which remained illegal throughout the remainder of her short stay in Belgium. At Sebastian's birth, and when Christina departed Belgium on July 23, 2001, she was an illegal alien. After the birth of Sebastian, on the basis of Christina's illegal immigration status in Belgium, Wim threatened to deport Christina and keep the baby. Although Wim insists that Belgium is the habitual residence of Sebastian, it is a country where the mother had no residency status or rights, whatsoever.

Upon her arrival in Ghent, Belgium and throughout the entire duration of her stay until her departure to the United States, and contrary to Wim's promises, Christina stayed in Wim's one-room loft apartment/office. Wim's one-room attic loft is situated on the fourth floor of an old industrial "walkup" factory building directly beneath the roof. The loft contained a kitchenette on one end with a lumpy sofa and hammock, and a mattress on the floor on the other end that served as the couple's bed. The majority of the living space was the office area containing an extremely long worktable. There were no dividing walls,

closets or separate living space except for the bathroom. Wim refused to lock the entrance door to the loft so that his assistants could come and go freely to work in the office. Wim also conducted business meetings with curators, dealers, collectors and the press in the loft. Christina had no privacy, whatsoever. During her entire stay in Belgium, Christina lived out of her one suitcase that was situated on the floor.

Christina did not speak Flemish, the language spoken in Ghent, nor did she ever learn the language. Christina rarely had access to Wim's automobile, and was thus subject to his control as to her local travel. Wim completely controlled the couple's finances. Christina had only one friend at the end of her stay in Belgium and on account of Wim's rages, felt scared and terrorized as if she were a prisoner.

When Christina arrived in Belgium, she slowly became ensnared in the nightmare world of Wim Delvoye, a domineering, psychologically and emotionally unstable artist known for his extreme obscenity-laden scatological abject art. Wim had lured Christina into his dark den, enticing her with false claims and promises that it was to be of limited duration. Once entrapped, he dominated and terrorized Christina by controlling every aspect of her life, keeping her isolated as he tried to break her will and sense of any worth. Christina suffered from verbal, psychological and emotional abuse. She became a constant victim of terror, intimidation, isolation, degradation and fear. A gentle and soft-spoken person, Christina suffered through Wim's frequent and unpredictable rages. He coerced Christina into submission with fearful displays of violent rages, obsessive insane jealousies, and threats against her life or the risk of losing her baby by having

Christina deported. He pounded Christina with insults, desecrating her sense of worth and self-esteem. She became a prisoner, living in a one-room loft with no walls or privacy. Indeed, Christina's only place of refuge or privacy was in the bathroom. Towards the end of her stay, and more intensely after Sebastian's birth, Christina lived in terror under Wim's raging and psychotic dominion. The whole time that Wim terrorized Christina, she was either pregnant or a frightened mother nursing a newborn.

Christina never intended to make Ghent, Belgium her permanent residence. Moreover, Christina never intended to abandon her home in Manhattan. However, Wim **unilaterally** decided that Ghent would become their home base. Wim terrorized Christina into submission. Christina always regarded the Manhattan apartment as their home. However, contrary to Wim's false promises, once Christina was in Belgium, Wim unilaterally decided to sell or rent out the Manhattan apartment against Christina's express wishes. This triggered fights between the two. Indeed, at trial, Wim admitted that Christina did not want the apartment to be sold because she considered it to be her home in New York, but that he "didn't care about that." By this admission alone, Wim admits that there was no agreement between the two as to where Christina's home would be, or at the very least that Christina's decisions were of no consequence to him.

The arguments escalated in Belgium as to Christina's and Sebastian's return to the United States. Finally, Wim told Christina to leave before he "got attached" to the baby. Christina immediately applied for Sebastian's U.S. passport at the United States Embassy. Consistent with his permission to leave, Wim signed a consent letter to obtain

the child's U.S. passport. Wim drove Christina and Sebastian to the airport, asking for several items to keep as remembrances of the child, while hysterically weeping and taking a video of the mother and child as they left. Christina and Sebastian returned to New Jersey on July 23, 2001, a time when Sebastian was just two months old, and was breastfeeding.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On February 22, 2002, Wim filed a Petition with the District Court of New Jersey for the Return of the infant child, Sebastian, to Belgium pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

In response to Wim's petition for the return of Sebastian to Belgium, on April 2, 2002, Christina filed a response and cross-motion to dismiss, pleading that the petition lacked virtually every essential element required to vest proper jurisdiction with the District Court under the Hague Convention. In her defense, Christina asserted, *inter alia*, that Belgium is NOT the habitual residence of Sebastian because there was no "settled intent" (a necessary component) to remain in Belgium indefinitely; Belgium was none other than a coerced residence; and that there was no wrongful removal or wrongful retention of the child because Wim consented to their departure. Further, in addition to her jurisdictional defenses, Respondent raised the defenses of acquiescence by the Petitioner, and grave risk of harm to Sebastian should the child be required to return to Belgium.

In its final opinion, the District Court properly ruled that the Petitioner had failed to meet his burden to prove that Belgium had been the habitual residence of Sebastian, and accordingly that there had been no wrongful removal of the infant from Belgium in the first instance. The opinion was, amongst other factors, based upon the District Court's rejection of Petitioner's "one country" argument, which postulates that where a child is born and subsequently removed, the birth country is arbitrarily its habitual residence. The District Court further held that there was no credible evidence that the stay in Belgium was ever jointly intended to be anything more than temporary. Rather, the District Court found that the overwhelming weight of the evidence was that the settled intent of the parties was to go to Belgium to bear the baby, followed shortly thereafter by a return to their home base in New York.

The Third Circuit Court of Appeals affirmed. The Third Circuit Court reaffirmed the well-established principle that there must be a degree of settled purpose and shared intentions by the parents regarding the child's habitual residence. The Court further ruled that, based on the unique set of facts to the underlying case involving a newborn child and a country where the mother was present only on a temporary basis, the child shall not be deemed a habitual resident of the country of birth.

SUMMARY ARGUMENT

The Third Circuit Court and the District Court properly applied existing case law as it relates to the determination of the habitual residence of a child prior to an

alleged wrongful removal. The analysis applied by the Courts correctly considered the "settled intent" of the parents of the child as it related to the child's residence, and the child, being two months of age, was not capable of forming any "settled intent" of its own.

In analyzing the case law, the Third Circuit Court and the District Court properly rejected Petitioner's contention that the country of one's birth is automatically the country of one's habitual residence. In this regard, the place of birth is subordinate to the expressed intentions of the parents of a newborn regarding where they and the child will reside. The intent of neither will control, rather it being the shared intent that is determinative, if a joint understanding is reached. The District Court's conclusions that Christina never had any intent of remaining in Belgium other than for the birth of her child was well-supported by the credible evidence adduced at trial, which factual findings were not disputed on appeal. As such, the fact was unequivocally established that there was no mutual settled intent to make Belgium the habitual residence of the child.

Both the Third Circuit Court and the District Court's analysis of the case through the lens of "settled intent" are wholly consistent with the precedent the Third Circuit Court set forth in its seminal opinion of *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995), along with the well-developed body of case law as decided throughout the nation.

REASONS FOR DENYING REVIEW

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS THAT BELGIUM IS NOT THE CHILD'S HABITUAL RESIDENCE IS CORRECT AND IS CONSISTENT WITH THE HAGUE CONVENTION AND WITH THE PREVAILING DECISIONS OF OTHER COURTS

A. The District Court Properly Evaluated The "Settled Intent" Of The Child's Parents Where, As Here, The Child Was Only A Two-Month-Old Infant, And, As A Matter Of Law, Cannot Have Acclimatized To Belgium By Virtue Of His Infancy

The gravamen of Petitioner's appeal is that the Third Circuit Court did not apply a "one country" analysis in determining the habitual residence of Sebastian.

While, ordinarily, a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective and the parents' present, shared intentions regarding their child's presence there, *Feder,* 63 F.3d at 222-24, the District Court properly adjusted the analysis to address the case of a young child, in this case a two-month-old neonate. As the District Court stated,

> "In the case of a newborn infant who is still nursing, it is particularly appropriate to focus on parental intentions in determining a child's habitual residence. *Cf. In re Ponath,* 829 F. Supp. 363, 367 (D. Utah 1993). A two-month old neonate simply has not been present anywhere long enough to have an acclimatization apart from his parents."

Therefore, properly applying the *Feder* rule, and consistent with prevailing case law as discussed in the Statement of Case, *supra,* the District Court focused at trial on the parents' shared intentions regarding Sebastian's presence in Belgium along with an analysis of Sebastian's circumstances there. The District Court's legal analysis and interpretation was upheld by the Third Circuit Court's affirmance.

The only contact that Sebastian had to Belgium was his birth. He remained in Belgium for only two months (one month longer than Christina would have preferred but for the fact that Wim refused to allow them to leave). By virtue of his infancy, Sebastian never acclimatized to Belgium. His entire world and existence centered around his mother.

After the completion of the two full-day plenary hearing, the Petitioner failed to produce any credible evidence that the habitual residence of Sebastian is Belgium, and proffered absolutely no credible proof that it was Christina's "settled intent" to remain in Belgium indefinitely, or to abandon New York as a habitual residence. Wim's sole basis for insisting that Belgium is Sebastian's habitual residence is because he was born there. Further, the evidence at trial clearly demonstrated that Wim was a liar and an extremely deceptive person. The evidence showed that, throughout the duration of their brief relationship, Wim freely lied to, and would say anything or act in any way to manipulate Christina.

Conversely, at trial, it was clearly demonstrated that Christina was a habitual resident of the United States, and the overwhelming evidence at trial proved that Christina never abandoned that residence. Persuaded by

Wim's insistence and false representations that he could not afford the U.S. medical costs, coupled with the false assurance that the visit to Belgium was temporary and for a limited duration, Christina traveled to Ghent, Belgium for the sole purpose of giving birth to Sebastian. At the time, Manhattan was the couple's home base. While the couple discussed other possible locations for a concurrent European home base, there was absolutely no settled intent to make Ghent, Belgium their residence, nor any settled intent to abandon their home in New York.

The District Court properly found that the substantial weight of the evidence supported a finding that Belgium was not the habitual residence of Sebastian. Any conflicting testimony by Wim that it was Christina's settled intent to relocate indefinitely to Belgium amounted to nothing more than his own unsubstantiated assertions.

The evidence showed that Christina had no mutual settled intent to make Belgium the family's habitual residence. If anything, Wim unilaterally decided that Ghent, Belgium would be the permanent home base for the family. However, Wim's unilateral decision does not, by itself, alter Christina's lack of settled intent, nor establishes Belgium as the habitual residence of Sebastian. The law is clear: one cannot unilaterally alter the settled intent of the parties. *See, Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. Cal. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001); *In re Ponath*, 829 F. Supp. 363 (D. Utah 1993). Indeed, as the *Mozes* Court stated, "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned." *Mozes*, 239 F.3d at 1079.

Wim's testimony clearly proved that any agreements, promises or representations that he made to Christina were false. Therefore, any decision or understanding that Christina had regarding the temporary nature of her visit to Belgium for the limited purpose of giving birth to Sebastian was premised on, and in reliance of, Wim's lies and false assurances. The district court's perception of the Petitioner's lack of credibility was overwhelmingly supported by the evidence adduced at trial, and such credibility determination is highly relevant and probative of the "settled intent" of the parents in determining the habitual residence of the child.

B. The Third Circuit Court's Decision Is Consistent With The Principles Set Forth In Its Seminal Decision In *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995)

The Third Circuit Court's decision is consistent with its decision in *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995). Indeed, it was the Third Circuit Court's decision in *Feder* that clearly established the doctrine of "settled purpose."

> "We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstance in that place and the **parent's present, shared intentions** regarding their child's presence there."

Feder, 63 F.3d at 224 (emphasis added).

Contrary to Petitioner's contention that the Third Circuit Court's ruling is an abrogation of its holding in *Feder*, the facts are clearly distinguishable. In *Feder*, the

family relocated to Australia because of the father's employment opportunities. While Mrs. Feder had personal reservations regarding the relocation, the evidence proved that the move was for an open-ended indefinite period of time. Indeed, the Third Circuit Court noted that the Feders listed their Pennsylvania house for sale, and sold many personal household items. *Feder*, 63 F.3d at 219. The Feders also purchased a house in Australia in their joint names. *Id.* While in Australia, Mrs. Feder extensively renovated their newly purchased home, enrolled her child into nursery and pre-enrolled her child in kindergarten for the following year. She also auditioned for a role in the Australian Opera Company, which she received. *Id.* The Third Circuit Court found that the particular set of facts in the *Feder* case indicated that at the time the Feders moved to Australia, it was "the couple's settled purpose to live as a family in the place where Mr. Feder had found work." *Id.* at 224.

Conversely, this degree of settled purpose to remain in Belgium for an indefinite period of time was completely absent in the present case. Christina went to Belgium for the expressed and limited purpose of giving birth to Sebastian based on Wim's false representations that he could not afford U.S. medical costs, and based on his false assurances that the stay would only be temporary. Further, Christina's conduct while in Belgium lacked any indicia of settled purpose as found in *Feder*. Christina lived out of one suitcase situated on the floor, she never learned the native language, Flemish, was socially isolated, and was an illegal alien with no legal status or rights. Further, unlike the Feder family, Christina left behind all her personal belongings and non-maternity clothing intact at their Manhattan apartment.

The Petitioner insists upon an extremely narrow reading and application of the Third Circuit Court's decision in *Feder*. Indeed, they have misconstrued the Court's decision as authority for establishing a "one country" rule. Such a tortured extrapolation of the *Feder* decision ignores the Third Circuit Court's ruling that the courts must also look to the shared intentions of the parents. Rather, the Petitioner suggests that habitual residence should be determined merely by looking "back" to the last country the child was present at the time of any alleged wrongful removal. Their proposed interpretation of the *Feder* decision suggests the creation of an arbitrary rule: if a child is born in a country, under any circumstance, and irrespective of the parent's shared intentions, and lives there (no matter how short a duration) prior to removal, than, that country becomes, as a matter of law, the habitual residence of the child. It's short and simple: if there is only one country involved, then that country MUST be the place of habitual residence. Common sense dictates that such a strict application of the Hague Convention would produce, in certain situations, utterly absurd results.

Indeed, it would suggest that the hypothetical posed by the District Court involving an American family that gives birth to child while vacationing in Switzerland would conclude that the habitual residence of the newborn child would vest in Switzerland.[2] Indeed, another hypothetical

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[2] At oral argument before the Third Circuit Court, the Justices posed the same hypothetical to Petitioner's counsel, who conceded that in such a case the habitual residence would be the foreign country; however, he further argued that such a hypothetical case was so rare as to be inconsequential.

would be in the case of an expectant mother, who is forcibly abducted from California into Mexico by a possessive domineering father, and, against her will, gives birth to her child on Mexican land before she flees with her child back to the United States. Applying such a stringent "one country" rule, this mother would also, potentially, be hailed back to Mexico under the Hague Convention. This is not in accordance with the Hague Convention standards. Indeed, if the birthplace of the child was the sole and dispositive criteria in determining the child's habitual residence, then the Hague Convention would have been drafted with such straightforward language. However, the Hague Convention was not written this restrictively.

The Hague Convention protects children from wrongful abduction, and returns them to the country of their habitual residence. The Hague Convention vests the power and wisdom upon the courts to make case-by-case determinations of a child's habitual residence. The courts must review the particular circumstances and facts of each case, so that it can rule judiciously and with an element of humanity.

The question is not whether a two-month-old infant must have a "habitual residence" as applied in the Hague Convention. In such rare and unusual cases such as Christina's, or the woman vacationing in Switzerland, or the expectant mother abducted to Mexico, the Hague Convention cannot be invoked to insist that the habitual residence of the newborn is the country of actual birth. In these situations, the parent must be permitted to return with the newborn to the place of their habitual residence. To insist, as Petitioner does, that such a newborn would not be afforded protection under the Hague Convention is

inaccurate. For, in the case of the family on a ski vacation in Switzerland, and whose marital residence and habitual residence is in the United States, should the mother unilaterally decide to fly directly to, and relocate to, Australia, the father would have every right under the Hague Convention to compel the return of the infant to the United States.

Indeed, the Third Circuit Court in its *Feder* decision expressly acknowledged that circumstances such as coerced residence would negate the strict "looking back" rule. In dicta, the Court stated that the facts of *In re Ponath*, 829 F. Supp. 363 (D. Utah 1983) were distinguishable from the facts laid out in *Feder*. The *Ponath* Court found a child to be the habitual resident in the United States, and not Germany, where "Petitioner's coercion of respondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany." *Id.* at 368.

The Petitioner's insistence upon the "one country" rule begs this Court to ignore the fact that Christina was lured to Belgium under false pretenses, lived out of one suitcase situated on the floor, she never learned the native language, Flemish, was socially isolated, and was an illegal alien with no legal status or rights. Further, leaving behind all her personal belongings and non-maternity clothing intact at their Manhattan apartment, Christina came to Belgium only to become imprisoned by a domineering and psychologically unstable man who terrorized her -- the whole time she was either pregnant or nursing an infant.

C. The Third Circuit Court Decision Is Not Inconsistent With *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), And Other Well-Developed Hague Convention Case Law

The Third Circuit Court's decision in the present case does not contradict nor contravene the rulings in either *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), or *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995). The facts in those cases, as in *Feder*, are clearly distinguishable. All the parents in these cases had wrongfully removed their children from countries where they, themselves, as parents had settled as families and resided for an indefinite basis. While the duration need not be permanent, it must be with the settled purpose of an indefinite duration of time.

In *Friedrich*, the Respondent mother, a U.S. citizen and member of the United States Army stationed in Germany, met and married the Petitioner father in Germany. Their only child was born in Germany. They remained in Germany as a family until the couple began to suffer marital problems. Without the father's consent or knowledge, the Respondent mother returned with the child to the United States. By this point in time, the child was already two years old. Here, unlike the present case, Mrs. Friedrich had been settled in Germany, and while she may have had future intentions of returning to the United States at some point, her presence in Germany was for an indefinite period of time.

Similarly, Petitioner's repeated reliance on *Nunez-Escudero v. Tice-Menley* is misplaced. The *Nunez* Court

rejected the mother's claim that the son's birth and seven week stay in Mexico before removal was like that of a baby born to a woman vacationing in Mexico, where the clear facts demonstrated that she had moved to Mexico on her own prior to the birth of her child, had married the child's father in Mexico, and had resided there with her husband with the shared intent to reside in Mexico for an indefinite period of time. Her presence in Mexico was never temporary or for a limited duration in time. Therefore, her claim was not supported by the particular facts of that case. Indeed, the Third Circuit Court's approach is not inconsistent with the *Nunez* decision, and the application of the "settled intent" analysis would have yielded the same result in that case. Moreover, the ruling in the *Nunez* case did not apply any "one country" theory, and is not authority for such a doctrine, as Petitioner would suggest.

Petitioner asks this Court to review the present case by applying an unreasonably narrow reading of the *Feder* decision, and to ignore the development and interpretation of the Hague Convention as applied by other federal courts. The Petitioner's heavy reliance on *Feder, Friedrich,* and *Nunez* is misplaced, and further ignores a wealth of other more relevant and factually-on-point case law. *See, e.g., Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. Cal. 2001); *Kanth v. Kanth*, 2000 U.S. App. LEXIS 27383 (10th Cir. Utah 2000); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001); *In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999); *Zuker v. Andrews*, 2 F. Supp. 2d 134 (D. Mass. 1998); *In re Ponath,* 829 F. Supp. 363 (D. Utah 1993).

The Petitioner attempts to distinguish these other highly relevant and controlling cases on the basis that they involved "a choice to be made between countries when

the *child* has lived in two different countries *prior* to the alleged wrongful removal." This construction is insupportable. Further, the Petitioner mischaracterizes the Third Circuit Court's decision as establishing a "neonate" exception. This is not the case. Both the Third Circuit Court and the District Court correctly ruled that, in cases of a newborn, because of the child's infancy, he or she could not, as a matter or law, acclimatize to any environment. As such, lower courts can only look to the shared settled intent of the parents. This approach is consistent with well-settled prevailing case law. *See In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted) (holding that a two-year-old child is unable to meaningfully and independently express his feelings regarding his habitual residence and has no capacity to determine such status); *Tsarbopoulos*, 176 F. Supp. 2d at 1055 ("For the newborn, Jason, and the two year old Joanna, there was understandably no acclimatization to Greece. At their ages, their world revolved around their mother, their home . . ."). Therefore, in cases involving young children, the courts are required to carefully evaluate the shared intentions of the parents.

The facts of *Tsarbopoulos* are extremely compelling to Christina's case. Petitioner asserts that *Tsarbopoulos* is irrelevant because there was a choice between "two countries." This is nonsensical. Indeed, it should be noted that the child in that case was only two-months-old when he moved from the United States to Greece. This fact did not prevent the *Tsarbopoulos* Court from holding that the United States was the children's habitual residence, notwithstanding the fact that the family returned to the United States over three years later.

In *Tsarbopoulos,* the couple relocated to Greece because of the husband's employment. The evidence before the court demonstrated that the petitioner was a highly volatile man who was extremely abusive and domineering to his submissive wife. The court found that the respondent barely could speak Greek, had decreased contact with her family, was extremely fearful of her husband, was isolated and confined to the home for extended periods, had no car or used public transit, had very limited social contacts, her phone calls were screened and monitored by her husband, and that many of the family belongings remained unpacked. The court found the husband to be a jealous and accusatory man who flew into uncontrollable rages. The husband was completely dominant in all essential matters affecting the couple and their family, had complete control of finances and financial records, and refused to pay for necessary expenses, thereby forcing the wife's family to pay. The court also noted that the husband still maintained ties with the United States, by using American credit cards and bank accounts, and that he maintained his New Jersey driver's license and filed New Jersey non-resident tax returns. *Id.*

The court found that as a result, the mother "did not acclimatize to Greece." The court stated, "As a consequence, she cannot be said to have made Greece the habitual residence of her children or to have joined Dr. Tsarbopoulos in his intent to do so." *Id.* Accordingly, the *Tsarbopoulos* Court concluded as a matter of law that the Hague Convention did not apply because the parents did not share a settled intent to change the family's habitual residence from the United States to Greece. *Id.*

The facts in *Tsarbopoulos* are sadly similar to Christina's. Wim kept Christina completely isolated. She had no

car or transportation, although she maintained her New Jersey driver's license. She could not speak Flemish. She had no significant friends or immediate family. Christina was an illegal alien in Belgium. Wim did nothing to correct her status. Wim persistently and methodically attempted to alienate Christina from her family and friends by constantly deriding and criticizing them to her. Wim gave her no money except for groceries. Christina had to rely on her family for personal funds. Wim controlled all aspects of the couple's finances. He monitored her calls. He employed terrorism and intimidation to force Christina into submission. Indeed, all the facts surrounding Christina's nightmare with Wim clearly demonstrate that it was impossible for Christina to have acclimatized to Belgium. Moreover, Christina could not have made any voluntary decision under such coercion.

See also, In re Ponath, 829 F. Supp. at 368 (In evaluating the parents' present shared intentions, there must be an element of voluntariness and purposeful design.) Courts have refused to return children to a contracting state where the evidence showed coercion and abuse, which effectively eliminated the necessary quotient of voluntary free choice. *Id.* ("Petitioner's coercion of respondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany.") *See also In re Bates*, No. CA 122.89 at 10, High Court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989). ("In this case, what began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United

States with the minor child and petitioner's willful obstruction of that purpose.") In such instances, the contracting state is no more than a coerced residence. Indeed, where there has been "verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of the victimized spouse asserted to manifest 'consent' must be carefully scrutinized." *Tsarbopoulos*, 176 F. Supp. 2d 1045.

D. The Petitioner Mischaracterizes The Third Circuit Court's Ruling As Focusing On The Future Intentions Of The Parties; The District Court Reviewed The "Settled Intent" Of The Parties, And The Evidence Adduced At Trial Overwhelmingly Supported The Fact That Christina Never Intended To Abandon Her Residence In Manhattan, And Went To Belgium For A Limited Purpose Of Temporary Duration

The Petitioner mischaracterizes Christina's testimony as regarding her "future intentions." The courts have rejected recognizing future intentions of those parents who have settled for an indefinite period of time in another country, but then changed their minds. This is not the case for Christina. Her testimony does not pertain to future intentions, but rather past shared intentions that were agreed to by both Christina and Wim.

As the District Court found the overwhelming circumstantial evidence adduced at trial corroborated Christina's claim that her decision to go to Belgium was for a very limited purpose of a defined duration of time. The evidence

at trial also proved that Christina was a victim of conniving "white lies" that deceived her into believing that the shared intentions by Wim were sincere at the time.

The critical distinction between the cases is whether the presence in a particular country is temporary or has an indefinite duration. While the duration need not be permanent, it must be with the settled purpose of an indefinite duration of time. As discussed *supra,* the Third Circuit Court's decision in the present case does not contradict nor contravene the rulings in either *Feder*, *Friedrich*, or *Nunez*, which involved parents who wrongfully removed their children from countries where they, themselves, as parents had settled as families and resided for an indefinite basis.

In *Kanth,* the court held that the petitioner father had failed to show that Australia was the habitual residence of the children. In doing so, the court found the following evidence persuasive in finding that respondent mother had no settled intent to remain in Australia. The family traveled to Australia on tourist visas; the father enticed the mother to go to Australia on the false assurance that the stay would be temporary; the family left most of their household furnishings and personal belongings behind; and email messages by the petitioner father to respondent mother's parents admitting to his efforts and desire to obtain U.S. employment. *Kanth,* 79 F. Supp. 2d 1317. *See also In re Morris*, 55 F. Supp. 2d at 1162 (finding that the parties intent to return to the United States was manifested by the fact that they stored their furniture and automobile in Colorado); *David B. v. Helen O.*, 164 Misc. 2d 566, 570, 625 N.Y.S. 2d 436 (N.Y. Fam. Ct. 1995)

(finding that parent's decision to leave behind personal belongings is relevant in determining the child's habitual residence).

As repeatedly asserted above, Christina left all her personal belongings and post-maternity clothing in their Manhattan apartment. This corroborates Christina's testimony that her travels to Belgium were strictly on a temporary basis. Further, the state of Christina's Manhattan apartment demonstrates that she had no intent to abandon her Manhattan home base.

CONCLUSION

To return Sebastian to Belgium in light of the overwhelming evidence that there was no settled intent by the parents to establish Belgium as the habitual residence of the child, and that the Hague Convention does not apply to this matter, would produce an absurd result that the Convention did not intend. As the *Morris* Court stated, "This should be carefully reviewed and carefully qualified if it [is] not to lead to absurd results." *In re Morris*, *supra*, 55 F. Supp. 2d at 1162, quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 145.

It is respectfully submitted that the Petitioner's petition for writ of certiorari on the grounds that the Third Circuit Court's decision contravenes the Hague Convention and the decisions of other Circuit Courts are meritless. For the above foregoing reasons, the Respondent

respectfully requests that the petition for writ of certiorari be denied.

Dated: September 19, 2003

Respectfully submitted,

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No. 03-280

In the
Supreme Court of the United States

WIM DELVOYE, in the Matter of Sebastian Delvoye,
an infant under the age of one,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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PETITIONER WIM DELVOYE'S REPLY IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wim Delvoye ("Mr. Delvoye"), respectfully submits this reply in further support of his petition to this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dated May 20, 2003 (Appendix to Petition ["A"]-1-A-7).

THIS COURT SHOULD GRANT MR. DELVOYE'S PETITION FOR A WRIT OF CERTIORARI

The sole purpose of the underlying proceeding brought pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (1986), is to determine whether Mr. Delvoye's country of citizenship (Belgium) or that of Respondent Christina Lee ("Ms. Lee") (the United States) will hear and determine custody and support issues for their child Sebastian Delvoye ("Sebastian" or the "Child"). Under the Convention, such determinations are based on whether the Child was wrongfully removed from or wrongfully retained outside of the Child's country of habitual residence. Hague Convention, Art. 4. It is undisputed that the Belgian courts are equally capable of adjudicating custody and support issues as are the courts of the United States or any of its individual states.

Distilled to its essence, the courts below were confronted with a mother, Ms. Lee, a United States citizen, and a father, Mr. Delvoye, a Belgian national, both of whom, indisputably, resided, before Appellee became pregnant, in their respective countries. Ms. Lee went to Belgium with Mr. Delvoye in November 2000 in the early stages of her pregnancy and began living with him there; their Child was born in Belgium on

May 14, 2001 and their Child lived exclusively in Belgium with his parents until Ms. Lee unilaterally removed him from Belgium and took him to the United States on July 23, 2001 because she no longer wished to remain with Mr. Delvoye in Belgium. Ms. Lee's actions violated Mr. Delvoye's joint rights of custody in the Child in abrogation of Belgian law and, it is submitted, violated the Hague Convention, to which both the United States and Belgium are signatory countries.

Ms. Lee's Brief in Opposition is replete with allegations, presented as facts, which are irrelevant on this petition but which also are not supported by the record below. While Mr. Delvoye recognizes that this Court does not review factual disputes, Mr. Delvoye believes that it is important for the Court to understand that the purported facts contained in Ms. Lee's Brief in Opposition are baseless.[1]

Putting aside her recriminations and hyperbole, Ms. Lee asserts that the District Court and the Third Circuit correctly determined that Belgium was not the Child's habitual

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[1] For example, Ms. Lee was not "entrapped" in Belgium or "terrorized" by Mr. Delvoye (*see* Ms. Lee's Brief in Opposition at 6-7). Indeed, during this period of alleged entrapment and terror, for which there is no record support, Ms. Lee was visited by her mother for three weeks, including two weeks *after* Sebastian's birth, and by her attorney-sister, Susan Lee, for a portion of that period. Yet, during their stay in Belgium with her, Ms. Lee did not seek their help to return with Sebastian to the United States. One would expect someone already supposedly entrapped and terrified to ask these two most-logical people — a mother and a sibling whose profession is to address difficult issues — for such help if, in fact, it were really needed. But she readily admits she did not. In any event, by Ms. Lee's own admissions, she was — at a minimum — living in Belgium, in a place which *she,* in a sworn affidavit in these proceedings, referred to as "home," without a clear or definite plan regarding where she, Mr. Delvoye and the Child might ultimately reside. When the relationship deteriorated to the point that she felt compelled to separate, it was therefore incumbent on her to avail herself of the well-equipped legal system in Belgium, where she was living and had given birth and where Sebastian had only ever lived.

residence: (1) because the neonate Child, as a matter of law, could not have been in Belgium for a sufficient amount of time to have "acclimatized" to Belgium;[2] and (2) because, looking at the "settled intent" of the parents, Ms. Lee never considered her stay in Belgium to be permanent and her "settled intent" was to have the Child in Belgium and thereafter return to her "New York home base" after which she and Mr. Delvoye would determine which European city would become their European home base (Brief in Opposition at 4).

Ms. Lee, in an effort to support the Third Circuit's decision, attempts to mold the "settled intent" cases to fit this case. The "settled intent" cases, however, do not apply here for two reasons. First, the Hague Convention concept of "settled intent" applies where a family has relocated from one country to another and the court has to choose which of the two — or more — countries in which the child has lived is the child's habitual residence. In that situation, the court analyzes the settled intent of the parents to determine whether the parents intended to abandon the prior habitual residence. "Settled intent" does not apply here where the Child was born and resided exclusively in one country prior to the wrongful removal (*see* Petition at 9-10).

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[2] The District Court opined that a neonate cannot have been present anywhere long enough to have an acclimatization apart from his parents. Acclimatization is the attachment that a mature child may develop in a new country *after* a wrongful removal. Article 13 of the Hague Convention excuses the duty to return a child to its country of habitual residence if the preponderance of the evidence demonstrates that a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views" has become so acclimatized to its new environment that the child objects to repatriation. *See, e.g., Blondin v. Dubois,* 238 F.3d 153, 166 (2d Cir. 2001); *England v. England,* 234 F.3d 268, 272 (5th Cir. 2000). Obviously, acclimatization has no bearing on cases involving children of tender years and is not relevant to a determination of habitual residence here.

Second, Ms. Lee focuses on *her own* future intentions as to where she and the Child would settle — future intentions that were not shared by Mr. Delvoye. Regardless of the inapplicability of the "settled intent" analysis to this "one-country" case, Ms. Lee's singular future intentions clearly are not reflective of the parties' "settled *future* intent" — a fact clearly recognized by the Third Circuit when it stated in its decision:

> Because petitioner and respondent lacked the "shared intentions regarding their child's presence [in Belgium]," *Feder*, 63 F.3d at 224, Baby S did not become an habitual resident there. Even if petitioner intended that he become an habitual resident, respondent evidenced no such intention.

Appendix to Petition at A-8.

It is here, we respectfully submit, that the Third Circuit erred. Future intentions — Ms. Lee's or otherwise — are irrelevant to the court's inquiry as to the Child's habitual residence. *Friedrich v. Friedrich ("Friedrich I")*, 983 F.2d 1396, 1401-02 (6th Cir. 1993) (quoted with approval in *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995)); *see also* Petition at 13-14. If future intentions were not irrelevant to the inquiry, then, in the case of a "one country" neonate child, such as the Child at issue here, when parents do not agree on where they intend in the future to live with the child, as the Third Circuit opined, "no habitual residence may ever come into existence" (Appendix to Petition at A-7). And, as a result, the child would not be afforded the protections of the Hague Convention.[3] This, we submit, is not the intention of the Hague Convention.

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[3] Ms. Lee also suggests that her habitual residence in the United States could be Sebastian's habitual residence. *See* Brief in Opposition at 1 ("There is no wrongful removal to the United States if (a) the parent consents to the child's removal, . . . or, (b) the Court finds the habitual residence of the child is the United States") and at 13 ("Indeed, as the

In its decision, the Third Circuit quoted from *Re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989), as follows:

> There must be a degree of settled purpose. . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

(Appendix to Petition at A-8.) To the extent that the "degree of settled purpose" referred to in *Re Bates* and the Third Circuit's decision (Appendix at A-8) may be read to be different from the "settled intent" doctrine embodied in cases such as, *e.g.*, *Mozes* or *Tsarbopoulos*, we submit that Sebastian's life had a degree of settled purpose because Belgium is where Sebastian was born and Belgium is where Sebastian lived with his parents until he unilaterally was removed from Belgium and brought to the United States by Ms. Lee.

The Hague Convention establishes a framework for determining which country shall hear and determine custody and support issues where a child has been wrongfully removed from or is being wrongfully retained in a member country. Ms. Lee voluntarily went to Belgium and availed herself of

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Mozes Court stated, 'in the absence of settled parental intent, courts should be slow to infer from such contacts that an *earlier* habitual residence has been abandoned' " (emphasis added)). *Mozes* is a settled intent case where the court chose between two countries in which the child had resided *prior to* the wrongful removal to determine habitual residence. This Child, however, is a "one-country" child who had only lived in Belgium prior to the removal. A child simply cannot be a habitual resident of a country in which the child has never lived. *Mozes v. Mozes*, 239 F.3d 10607, 1082 (9th Cir. 2001) ("[W]hatever the parents' intent, habitual residence cannot be acquired without physical presence"). Furthermore, as the Third Circuit recognized, "[t]o say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create and impermissible presumption that the child's habitual residence is where the mother happens to be." (Appendix to Petition at A-7.)

the Belgian medical system for her pre-natal care and the birth of their Child. Having done so, and having given birth to Sebastian in Belgium, she and the Child became subject to Belgium law, including with respect to issues of custody. Under Belgian law, Mr. Delvoye had joint custody of the Child from his birth. When the relationship deteriorated and Ms. Lee no longer wanted to remain with Mr. Delvoye, Ms. Lee was bound to avail herself of the Belgian legal system to determine custody and support issues.

It is undisputed that the Belgian courts are well-equipped to address issues of custody and support. The treaty between the United States and Belgium manifested in the Hague Convention should have precluded the courts from rewarding Ms. Lee's decision to use self-help in (i) abrogating Mr. Delvoye's joint custodial rights and (ii) selecting the forum in which issues of custody and support are to be resolved.

To create, as did the Third Circuit, an exception to habitual residence where none was intended by the Convention, is antithetical to the Convention itself, rewards an abducting parent, encourages others to take similar actions in contravention of the mandate of the Hague Convention, and suggests that the courts of the United States — the country to which the child has been removed — do not consider the courts of Belgium — the country from which the child was removed — capable of determining issues of custody and support. *See, e.g., Friedrich v. Friedrich ("Friedrich II")*, 78 F.3d 1060, 1068 (6th Cir. 1996) ("In thinking about these problems, we acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. . . . When we trust the court system in the abducted-from country, the vast majority of claims of harm — those that do not rise to the level of gravity required by the Convention — evaporate").

The Third Circuit's decision is fundamentally flawed and should not be allowed to stand.

CONCLUSION

For these reasons, as well as the reasons expressed in the Petition, this Court should grant petitioner Wim Delvoye's Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

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Respectfully submitted,

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